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ALEXANDER L. STEVAS,
CLERK

Case Number 84-1909

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BRIAN IVAN BROWN

Petitioner

v.

EARLE I. ERMAN and NEAL SUTHERLAND

Respondents.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should plaintiffs' counsel be fully compensated for all time reasonably expended representing objecting plaintiffs in a class action in trial court, on a successful appeal and in subsequent proceedings?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Brian I. Brown petitions this Court to issue a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals entered in this action on December 3, 1984. Petition for rehearing in the court of appeals was denied on January 22, 1985.

REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinions of the courts below are unreported. The December 3, 1984 opinion of the Sixth Circuit Court of Appeals is reproduced in the appendix as are the November 23, 1983 order of the United States District Court for the Eastern District of Michigan and the February 7, 1983 order of the United States Bankruptcy Court for the Eastern District of Michigan.

STATEMENT OF THE GROUNDS ON WHICH SUPREME COURT JURISDICTION IS INVOKED

This petition for writ of certiorari is based on the judgment entered on December 3, 1984. A motion to file the petition for rehearing out of time was granted on December 21, 1984. The order denying rehearing was filed on January 22, 1985.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1) which reads:

> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> 1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATUTES AND REGULATIONS WHICH THIS CASE INVOLVES

This case involves the following statutes: 15 U.S.C. 1640(a)(3) and M.C.L. 445.911(2).

15 U.S.C. 1640(a)(3) provides:

> Civil Liability
> (a) . . . Any creditor who fails to comply with any requirement imposed under this chapter . . . with respect to any person is liable to such person in an amount equal to . . . (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

M.C.L. 445.911(2) provides:

> (2) Except in a class action, a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages or $250.00, whichever is greater, together with reasonable attorneys' fees.

STATEMENT OF THE CASE

Petitioning attorney Brian I. Brown represented members of a class action who objected to a settlement of the class action in an adversary proceeding in bankruptcy court. After a successful appeal to district court petitioner sought attorney fees. His application was denied in bankruptcy court. A partial allowance was made on appeal to district court.

Petitioner began representing Robert and Constance Sheppard in August of 1981, when he filed a Chapter 13 bankruptcy proceeding on their behalf in the bankruptcy court in Flint, Michigan. Petitioning attorney Brian I. Brown then prepared a class action suit on the Sheppards' behalf against Remvest - Group Ten - Emil Coolidge mortgage companies and the LeBlanc family that ran the companies.

Group Ten Mortgage Corporation arranged

a $2,561.30 loan for the Sheppards from Emil Coolidge Mortgages, Inc. The fee for arranging the mortgage was $4,200. The Suit included claims under the Truth In Lending Act and Michigan's consumer protection act and usury law. A similar suit was prepared and filed by attorneys in Grand Rapids, Michigan. When the Remvest concerns filed Chapter 11 bankruptcy proceedings in Detroit, the Grand Rapids suit Mesler v. Remvest et al and the Flint suit Sheppard v. Group Ten et al were removed to bankruptcy court. Jurisdiction of the bankruptcy court over adversary proceedings is found in the bankruptcy code and bankruptcy court rules.

The Mesler suit was certified as a class action on May 25, 1982. The Sheppards subsequent motion to consolidate the actions was denied. The court found that the Sheppards were within the Mesler class so the actions had become merged.

The Sheppards then filed an appearance in the Mesler action through their attorney Brian I. Brown on June 21, 1982. Mr. Brown prepared objections to the proposed settlements and argued on behalf of the Sheppard objections on September 7, 1982. An appeal was taken from the bankruptcy court's approval of the class action settlements. Two subclass settlements corresponding to the two consolidated Chapter 11 proceedings were approved by the bankruptcy court. On appeal the district court vacated the settlements and remanded the cases to bankruptcy court on October 29, 1982 in an opinion reported as Sheppard v. Erman, 24 B.R. 560 (1982).

The Sheppards objected to the settlements as presented on November 26, 1982. The bankruptcy court approved the settlements. The Sheppards appealed and the district court affirmed. The Sixth Circuit

* There is no page 7.

also affirmed. The Sheppards have filed a petition for writ of certiorari to the Sixth Circuit contemporaneous with the instant petition. A request for attorney fees by attorney Brown after the successful appeal to district court was denied by the bankruptcy court. On appeal, however, the district court reversed and allowed a fee of $3,750 of the $35,300.41 requested. Remvest Federal Association, Inc. was liable for one half of the fee and Remvest Mutual Investment Trust was liable for the other half. Attorney Brown then appealed to the Sixth Circuit asking for full compensation for all time reasonably expended on behalf of the Sheppards. The Sixth Circuit affirmed the district court decision. Attorney Brown herein petitions this Court for writ of certiorari to the Sixth Circuit.

ARGUMENT

Review on certiorari should be granted in this case for special and important reasons. The Sixth Circuit Court of Appeals has sanctioned a decision that departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, moreover, the Sixth Circuit has decided a federal question in conflict with Hensley v. Eckerhart, 103 S.Ct. 1933 (1983).

In Hensley the dissenting opinion presented the position that the majority opinion required unnecessary explanation of attorney fee awards by the district courts. However, even the dissent allowed that reversal would be appropriate where "the award is so low as to provide clearly inadequate compensation to the attorneys on the case". The majority in Hensley commented, "It remains important for the dis-

trict court to provide concise but clear explanation of its reasons for the fee award." In remanding to the district court the Court stated, "we hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney fees (in civil rights litigation)." This Court was unable to affirm in Hensley because the district court's opinion did not properly consider the relationship between the extent of success and the amount of the fee award.

In the case before the Court the United States District Court for the Eastern District of Michigan stated in a bench opinion:

> These services were rendered between September 7 and October 29, 1982. I estimate, based upon my review of the file and the rather spartan nature of the papers filed by Brown, to have involved approximately 50 hours of lawyers time.

The court used an estimate even though counsel's time sheets were in the court file and even though opposing counsel

concluded on the record that 106.25 hours (Appendix Page 31) could arguably have been devoted to the successful appeal reported as Sheppard v. Erman, 24 B.R. 560 (1982).

If the time spent on the objections and the first successful appeal is limited to the period between filing an appearance in the adversary proceeding on June 21, 1982 and reviewing the favorable appeal decision with the clients Sheppard on October 30, 1982, petitioner's time expended was 133.25 hours not the 50 hours estimated by the district court.

Petitioner asserts that the Sheppard class action suit was merged into the Mesler suit; therefore, his time should be calculated from August of 1981 when he first consulted the Sheppards about the Group Ten - Remvest scheme. The time spent to October 30, 1982 was calculated to be 235.05 hours: this is the figure that was provided to opposing counsel and

the court in a letter dated November 15, 1983. Attorney fees at $95 per hour, mileage, and court costs come to $23,069.66. The district court only allowed $3750.

If petitioner prevails in the companion petition for writ of certiorari on behalf of the Sheppards then fees for the time subsequent to October 30, 1982 should be covered in a fee award.

The factors relevant to making an attorney fee award that were announced in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) were not mentioned by the district court in its opinion nor were they discussed at the hearing. Both the opinion and hearing transcript, November 21, 1983, are included in the appendix to this petition.

The twelve factors that were announced in the Johnson case are;

1. The time and labor expended;
2. The novelty and difficulty of the questions raised;

3. The skill required to properly perform the legal services rendered;
4. The attorney's opportunity costs in pressing the instant litigation;
5. The customary fee for like work;
6. The attorney's expectations at the outset of the litigation;
7. The time limitaitons imposed by the client or circumstances;
8. The amount in controversy and the results obtained;
9. The experience, reputation, and ability of the attorney;
10. The undesirability of the case within the legal community in which the suit arose;
11. The nature and length of the professional relationship between attorney and client;
12. Attorneys' fees awards in similar cases.

In Northcross v. Board of Education of Memphis Schools, 611 F.2d 624 (6th Cir. 1979), cert denied 447 U.S. 911 (1980) the court adopted an analytical approach in making attorney fee awards based on the number of hours expended on the case. The language used in Northcross is similar to that of Samuel R. Berger, Court Awarded Attorney's Fees: What Is Reasonable ?, 126 Penn. L. Rev. 281 (1977). Berger concludes that:

> A reasonable attorney fee is one that fully compensates lawyers for the full market value of their time and effort . . . It entails consideration of most of the factors listed by various courts but within an analytical framework that reflects private time-based fee setting.

In Northcross the court decided that "counsel for the prevailing party should be paid . . . for all time reasonably expended on a matter." 611 F.2d 624 @ 633. The Northcross court noted that if the "award is contingent upon success' and for an 'unpopular cause', these factors affect the market value of the services rendered. If the attorney 'only will be paid in the event of victory' the rate of compensation should be adjusted upward. "In developing areas of law . . . a substantial upward adjustment (is required) to compensate for risk." 611 F.2d 624 @ 638.

Under Northcross the district court is required to make a clear and adequate finding of fact on the record in order to set

a reasonable attorney fee. No such finding was made in this case nor was there a finding of the fair market value of counsel's services or consideration of a contingency factor. The court based it's fee award on an hourly rate of $75 per hour.

The Sheppards' attorney has been a member of the bar for eleven years. "The average attorney fee hourly rate ofr Michigan lawyers in private practice in 1980 was $70.76." Report on Economics of Law Practice, Michigan Bar Journal, Feb., 1982, p. 116. Using a rate of inflation of 10% per year the average rate for 1984 would be $103.50. In Northcross the court allowed $75.00 per hour for office services and $125 per hour for trial work. Over five years have passed since the Northcross decision. The percentage increase in attorney fees from 1976 through 1980 was reported to be 25.2% in the economics report cited above. Using the same rate of increase for the interven-

ing years, the 1984 rates would be $110.45 per hour and $166.36 per hour for office services and trial work. Counsel for class plaintiffs in Mesler requested $115 per hour in their petition of December, 1982. The award to petitioner here is so low as to be clearly inadequate compensation for petitioner's efforts.

The opinion of the district court cited Frankenstein v. McCrory Corp., 425 F. Supp. 762 (1977), where a New York district court allowed attorney fees to a plaintiff who objected to a settlement in a class action suit. In Frankenstein the court stated:

> While the court does not conclude that an objector to a class action settlement is properly awarded counsel fees if every case, where the objections filed produced a beneficial effect upon the progress of the litigation, the award of fees is appropriate. . . . In this action, the objector filed a formal Notice Of Intention to Appear and to object to the structure of the settlement. The objections raised, although ultimately overruled, were not frivolous and the presence of an objector represented by competent counsel transformed the settlement hearing

> into a truly adversary proceeding. The objections to this settlement caused this court to spend more hours analyzing and assessing the complex settlement agreement, and cast in sharp focus the question of the fairness and adequacy of the settlement to all members of the class.

The reasoning of Frankenstein also applies to the second appeal in the instant suit to the district corut, and the appeal to the Sixth Circuit. Full compensation for the 364.90 hours requested by the petitioner should be allowed.

The district court did not allow compensation for travel time from Mr. Brown's office near Flint to the bankruptcy court in Detroit for hearings and document filings. Appendix page 40. Travel time was allowed in McPherson v. School District #186, 465 F.Supp. 749 (S.D.Ill. 1978), a civil rights actiсn, the court stated in ruling on an attorney fee request by prevailing plaintiff's attorney:

> The fee statute clearly intends for

> an attorney to be compensated for all time reasonably spent on the case. This follows from the fact that a lawyer's time is his stock in trade. 465 F.Supp. 749 @ 758.

The McPherson court found compensation for travel time at a reduced rate appropriate. In Imprisoned Citizens Union v. Shapp, 473 F.Supp. 1017 (E.D.Pa. 1979) the court noted that for some functions no delegation of the task of traveling can occur nor can other billable legal work be performed while driving; therefore, full compensation for travel time was allowed.

OTHER THEORIES

Alternate theories of recovery by petitioner are the private attorneys general concept and the order of the bankruptcy court under which class plaintiffs' counsel received their fees.

The Truth In Lending Act at 15 U.S.C. 1640 provides that " in the case of any successful action to enforce the foregoing liability the costs of the action, together

with a reasonable attorney's fee as determined by the court" are to be awarded to the prevailing plaintiff.

> (T)he congressional goals underlying the Truth In Lending Act include the creation of "a system of 'private attorney generals' who will be able to aid the effective enforcement of the Act." Thomas v. Myers-Dickson Furniture Company, 479 F.2d 740 @ 748 (5th Cir. 1973)

In Postow v. OBA Federal Savings and Loan Association, 627 F.2d 1370 (D.C.Cir. 1980) the court in allowing attorney fees noted that:

> The legislation at issue here was specifically designed by Congress to be enforced through private citizens suits. D.Trp.No. 278, 93rd Congress 1st Session. 15 (1973)

The Michigan consumer protection act states at M.C.L. 445.911(2):

> A person who suffers loss as a result of a violation of this act may bring an action to recover actual damages . . . together with reasonable attorney's fees.

Both the Truth In Lending Act and the Michigan consumer protection act provide for

reasonable attorney fees for successful plaintiffs under a private attorney's general concert.

The merger of the Sheppard class action into the Mesler class action and the subsequent settlement constitutes ' a successful action' under the Truth In Lending Act. Reasonable attorney fees to counsel for the Sheppards are appropriate. The private attorneys' general legislation does not require appointment of counsel for recovery under the acts.

Additional authority for an award of attorney fees to petitioner is found in the 'Order for Certification of Class Action" in the Mesler matter dated May 25, 1982. The order reads in part:

> If you do not request exclusion on or before June 21, 1982 from the Plaintiff Class you may if you desire enter an appearance in the case through your own counsel. If you do not request exclusion and you do not enter an appearance through counsel of your own choosing you will be represented by the following counsel for the

Plaintiffs: Willis L. Ash, Jr. . . . James Booth Burr, Jr. . . . Thomas Koernke

Petitioner filed an appearance in the adversary case on June 21, 1982 in accord with the May 25 order. The Sheppards were therefore represented in the adversary matter by attorney Brown. The Sheppards filed objections to the proposed settlement and successfully pursued an appeal to district court.

The law firms representing the named class plaintiffs received an order allowing attorney fees in the amount of $174,685 and $14,670 expenses on January 26, 1983. On June 14, 1983 they received an order for further services in the amount of $34,200 plus $4,644.09 expenses. Petitioner Brown requested on November 21, 1983 a total award of $35,300.41 for attorney fees and expenses.

The authority for the awards to attorneys

Ash, Burr and Koernke was the May 25, 1982 order. That order clearly says if you do not request exclusion (the Sheppards did not) and you do not enter an appearance through counsel of your own chosing you will be represented by Ash, Burr and Koernke. The Sheppards entered an appearance through counsel of their choosing thus they were not represented by Ash, Burr and Koernke. The quoted portion of the notice of pending class action was the authority for the awards to class counsel and should also be equally valid authority for an award to petitioning attorney Brown.

In McGowan v. Credit Center of North Jackson, Inc., 546 F.2d 73 (5th Cir. 1977) attorney fees for work done on appeal was allowed.

> The Congressional goals underlying the Truth In Lending Act include the creation of a system of pr-vate attorney's general to aid in effective enforcement of the Act. . . . Since plaintiff prevailed on this

appeal the district court should also award additional attorney's fees to compensate him for this service. 546 F.2d 73 @ 77.

CONCLUSION

The decisions of the court of appeals and district court are in conflict with the Hensley standards for awarding attorney fees and the accepted and usual course of judicial proceedings as described in Hensley, Northcross and Johnson. A remand to district court for hearings on the fair market value of petitioners services and determination of the number of hours reasonably expended on the successful appeal is appropriate as is a ruling that the time spent subsequent to the successful appeal is compensable.

Date June 1, 1985

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No. 83-1835

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRIAN I. BROWN
Plaintiff-Appellant,

v.

EARLE I. ERMAN and
NEAL SUTHERLAND,
Defendants-Appellees.

Filed Dec 3, 1984
John P. Hehman, Clerk

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: LIVELY, Chief Judge; MERRITT, Circuit Judge: and PECK, Senior Circuit Judge.

PER CURIAM. This is an appeal by an attorney for objecting members of a sub-class in a class action who alleged that two settlements approved by the bankruptcy court and the district court were not fair and adequate. Two trustees in bankruptcy opposed the motion. The bankruptcy court denied the motion for attorney fees, but the district court allowed a portion of the requested fee upon finding that the attorney for the objecting class members

had rendered some non-economic benefit to the bankruptcy estate. The trustees in bankruptcy did not file a cross-appeal, but the attorney for the objectors has appealed the partial allowance, contending that it is totally inadequate.

No purpose would be served by reciting the history of this litigation. It is sufficient to note that the appellant has failed to point to any statutory entitlement for attorney fees in this case in view of the fact that his clients were given an opportunity to "opt out" of the class and failed to do so. The bankruptcy court appointed attorneys for each subclass within the class and these attorneys provided representation to all class members. The district court found that the appellant had rendered some non-economic benefit by calling to its attention procedural errors of the bankruptcy court and allowed a fee

for the reasonable time spent by the appellant on the procedural issues. However, the district court found that the appellant provided no other needed services and that the estate should not be burdened with additional fees.

Upon consideration, this court concludes that the district court did not abuse its discretion. The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT SHEPPARD and
CONSTANCE SHEPPARD,
Plaintiffs/Appellants,

v.

EARLE I. ERMAN and
NEIL SUTHERLAND,
Defendants/Appellees.

Civil No. 83-CV-0583-DT

Bankruptcy Nos. 82-01126-W
82-01312-W

Adversary No. 82-0518

ORDER ALLOWING ATTORNEY FEES

On February 17, 1983 Brian I. Brown, Esq., appealled from the Order Denying Compensation To Attorney Brian I. Brown entered in the Bankruptcy Court in the captioned proceedings on February 7, 1983. For reasons stated on the record on November 21, 1983 the order of the Bankruptcy Court is REVERSED and attorney fees are allowed Brian I. Brown, Esq. in the amount of $3,750. One-half of the fees are charged to Remvest Mutual Investment Trust

as an expense of administration and one-half of the fees are charged to Remvest Federal Association, Inc. as an expense of administration. SO ORDERED.

Dated: Nov 23, 1983 Avern Cohn

Detroit, Michigan United States
District Judge

BY _____
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN BROWN,
Plaintiff
v. Civil Action
No. 83-0583
EARLE I. ERMAN, and
NEIL SUTHERLAND,
Defendants.
----------/

Proceedings had in the above-entitled matter before the HONORABLE AVERN COHN, Federal Court Judge, County of Wayne, State of Michigan, on Monday, November 21, 1983.

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Appearing on behalf of Defendant
Neil Sutherland

Elizabeth Diann Ferguson, CSR-1347

Detroit, Michigan
Monday, November 21, 1983
At about 9:00 a.m.

- - -

THE CLERK: Calling case number 83-0583, Brown versus Sutherland.

THE COURT: Do you have anything further to report? You have not, any of you, filed anything further other than Brown filing this schedule; is that correct?

MR. SHEFFERLY: Your Honor, Phillip Shefferly, appearing on behalf of Neal Sutherland, the appellee.

As your Honor may recall, the last hearing that the Court had requested the Petitioner Brown to submit the documentation to us within one week of the hours spent on the initial appeal.

When I did not receive that within two weeks, I contacted Mr. Brown by phone, and he advised me that it would be forthcoming. At that point, I indicated to him and confirmed it by letter to Mr. Brown, which I copied to the court file, indicating that inview of his failure to comply with the Court's request, that I would take the position at the hearing today he would not be entitled to any fees.

I would just simply indicate to the Court that in any event, I received a letter from Mr. Brown the following day. In the meanwhile, however, I had done a little bit of Mr. Brown's work myself in terms of computing the hours based on his time sheet, that, arguably, could have been devoted to that appeal.

My conclusion is that 106.25 hours could arguably have been devoted to that appeal. That does not mean to suggest to

the Court that we would consent to an award of fees for those hours; for example, some of those items include -- I believe there is an entry on October 21, 1982, for 16 hours spent at a status conference, including time for lunch and dinner.

I was at the same status conference and do not recall it lasting 16 hours.

THE COURT: Well, he added eight for you and eight for you to balance it out, perhaps.

MR. SHEFFERLY: Perhaps, your Honor. By way of example, there is another one on October 8, 1982, it shows five hours for filing a Notice and a Motion.

THE COURT: I understand.

Have you filed anything further?

MR. SHEFFERLY: Not other than the letter, your Honor.

THE COURT: Have you filed anything further?

MR. RYAN: No, your Honor, we have not.

THE COURT: Do you have anything further to say, Mr. Brown?

MR. BROWN: No, your Honor.

THE COURT: Okay.

MR. BROWN: Actually, I would like to summarize the situation as I understand it.

The Court asked that I make a summary or a division of the hours and decide -- and indicate how many hours were spent up to the point of successful appeal; after that point, then, the hours were to be deleted.

I made calculations, deleted the time and expenses from that point on; and sent a letter to Mr. Shefferly and a copy to Mr. Hurschber and a copy to the Court.

THE COURT: Is that it?

MR. BROWN: No.

Before Mr. Shefferly's letter that he sent, I did talk to him on the phone and told him that -- I gave him the numbers over the telephone; and I told him that I had prepared a letter over the weekend. Before that, however, my typist was at the time, she was in the hospital; and that I would be getting a letter out to him within a day or so.

In fact, the letter was on its way to him when I received his letter.

THE COURT: Okay.

Gentlemen, this case has involved far too much judicial time and lawyers' time. There is a line someplace, a lot of sound and jury, signifying nothing. Almost nothing, would be appropriate.

I am going to do something that I don't often do: I am going to dispose of this matter in the way that I think appropriate. And if I am wrong, then I am wrong.

* There is no page 35.

This is an appeal from an Order of Bankruptcy Court on February 7, 1983, denying an applicaiton for attorney fees by Brian I. Brown, attorney for Constance and Robert Shepperd.

Briefly described, the bankruptcy proceeding involved a reorganization of two companies engaged in second mortgage financing using funds borrowed from numerous individuals.

These companies used the funds to make second mortgage loans. The Shepperds were second mortgage borrowers while Brown represented the Shepperds in a variety of ways during the course of the bankruptcy proceedings. The only meaningful contribution he made to these proceedings was the filing of objections to the settlement of a class action by the second mortgageor.

The objections to the settlement were filed on September 7, 1982. These objec-

tions to the settlement were rejected by the bankruptcy judge. On appeal, on an appeal filed September 9, the approval of the settlement was reversed by this Court in an Order dated October 29, 1982, and remanded to the bankruptcy court for a meaningful consideration of the terms of the settlement.

This effort by Brown made a meaningful non-economic contribution and conferred a meaningful non-economic benefit on the bankruptcy estate in assuring that a proper consideration after proper notice to all affected persons was given to the settlements.

See Mills versus Electric Auto-Light, 396 U.S. 375 (1970); City of New York versus Darlene Deleware, 440 Fed. Supp. 1132 (S.D. N.Y. 1977); Frankenstein versus McQuarry Corporation, 425 Fed. Supp. 762 (S.D.N.Y. 1977)

In denying Brown's application for attorney fees, the bankruptcy judge simply failed to recognize the non-economic benefits conferred by Brown's efforts on appeal.

Brown, in support of his appeal, has filed a schedule entitled "time sheet," which purport to enumerate Brown's services, travel time, and expenses, between August 1981, when he initially interviewed the Shepperds, through October 1983.

The schedule logs 364.90 hours devided into services prior to a second appeal of the approval of the settlement following the remand; services on the second appeal and hours related to the pending application for attorney fees.

It should be noted that the second appeal was dismissed on the grounds that the bankruptcy judge had properly approved the settlement.

No effort has been made by Brown to

separately describe the hours related to the objections to the settlement and the appeal which resulted in a reversal and remand.

These services were rendered between September 7, 1982, and October 29, 1982. I estimate, based upon my review on the file and the rather spartant nature of the papers filed by Brown, to have involved approximately 50 hours of lawyers' time.

In the past, I have used $75.00 an hour as a benchmark hourly rate. Nothing has come to my attention which exist that Brown is entitled to any higher hourly rate.

This matter can be demonstrated by examination of the files; has already involved far too much of lawyer time and Court time; occassioned in part by the bankruptcy judge's approach; in part, by Brown's stubborness and lack of under-

standing of the relevant issues; and in part, by the shotgun response and stubbornness of the lawyers for the trustees and thoses involved in the class action.

To remand this matter for further consideration to the bankruptcy judge, who has recently become a federal judge, would unduly prolong the matter as well as resulting if further expense to all concerned.

I am satisfied that Brown is entitled to the fee of $3750.00 for his meaningful services to the proceedings relating to the settlement of the class action; and because of the manner in which the settlements were handled, his fees are to be paid as an expense of administration one half by Remvest Mutual Investment Trust; and one half by Remvest Federal Association, Inc.

There is to be no reimbursment for travel time or for expenses incurred.

The expenses incurred are diminimous; the travel time results from Brown's choice of office location.

No authority has been cited for allowing travel expenses under such circumstances; and an appropriate Order will be entered by the Court.

I thank you, gentlemen, and I hope it is the last time that I see you on this matter.

MR. RYAN: Thank you, your Honor.

MR. BROWN: Thank you, your Honor.

MR. SHEFFERLY: Thank you, your Honor.

- - -

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

REMVEST MUTUAL INVESTMENT TRUSE
Case No. 82-01126-W
REMVEST FEDERAL ASSOCIATION, INC.,
Case No. 82-01313-W
Debtor.
_____/

ORDER DENYING COMPENSATION
TO ATTORNEY BRIAN I. BROWN

At a session of said Court held in the City of Detroit, County of Wayne State of Michigan on February 7, 1983

PRESENT: HON. GEORGE E. WOODS, Unites States Bankruptcy Court Judge

This matter having come on to be heard upon the Application for Fees of Brian I. Brown, Attorney, and the Court having held a Hearing on December 13, 1982, and the Court having made the following findings:

1. The request by Brian I. Brown did not comply with the requirements allowing compensation under 11 USC § 506(b) of the Bankruptcy Code.

2. That the Court had never entered

an Order appointing him to represent any party in interest in the Estates of the above-captioned Debtors.

3. That the services provided by Brian I. Brown were of no economic benefit to the Debtors' Estates.

4. That the actions by Brian I. Brown did not help in preserving the assets of either Debtors' Estate.

5. That the actions by Brian I. Brown caused a substantial cost and burden on the Debtors' Estates.

6. That Attorney Brian I. Brown had no relation to the Debtor REMVEST FEDERAL ASSOCIATION, INC.

7. That the Time Sheets submitted by Attorney Brian I. Brown should be stricken for lack of proper documentation

NOW, THEREFORE:

IT IS HEREBY ORDERED that the Application for Fees by Attorney Brian I. Brown be denied for the reasons set forth here-

in above.

GEORGE E. WOODS

UNITED STATES BANKRUPTCY COURT
JUDGE

A TRUE COPY

CLERK, U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN

/s/

Deputy Clerk

7 FEB 1983

No. 83-1835

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRIAN I. BROWN,
Plaintiff-Appellant,

v.

ORDER

EARLE I. ERMAN and
NEIL SUTHERLAND,
Defendants-Appellees.

_____/

BEFORE: LIVELY, Chief Judge; MERRITT, Circuit Judge; and PECK, Senior Circuit Judge.

The appellant Brian I. Brown has filed a petition for rehearing directed to the disposition of this appeal by per curiam opinion filed on December 3, 1984. Upon consideration fo the petition for rehearing this court concluded that it did not overlook or misapprehend any fact or issue of law presented in this appeal.

Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

JOHN P HEHMAN /
Clerk

NUMBER 83-1835

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRIAN I. BROWN,
Plaintiff-Appellant,

vs

EARLE I. ERMAN, CHAPTER 11 TRUSTEE FOR REMVEST MUTUAL INVESTMENT TRUST, AND NEAL SUTHERLAND, CHAPTER 11 TRUSTEE FOR REMVEST FEDERAL ASSOCIATION, INC.,
Defendants - Appellees.

MOTION TO FILE PETITION FOR REHEARING OUT OF TIME

(Clerk's Stamp) FILED DEC 2, 1984
JOHN P. HEHMAN, Clerk

(Clerk's Stamp) MOTION GRANTED
ENTERED BY THE CLERK
PURSUANT TO RULE (4F)
SIXTH CIR. RULES.
JOHN P. HEHMAN
CLERK

Appellant moves this court to file his Petition For Rehearing Out Of Time stating as follows.

1. The court's decision was entered on December 3, 1984.

2. A combination of Christmas mail

and counsel's attendance at an out of town conference resulted in his receipt of the decision on December 9, 1984.

3. Appellant's petition for rehearing was mailed on December 17, 1984 14 days from the date of the decision.

4. Rule 40(b) provides that petitions for rehearing shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs.

5. Rule 31(b) provides for filing an original and three copies with the clerk and Rule 25 deems briefs to be served when mailed.

6. The clerk of the sixth circuit states that the petition is served when received at the sixth circuit offices.

7. Appellant, therfore, moves this court to allow his petition for rehearing to be filed out of time.

Date 12/19/84

Brian I. Brown
Attorney At Law
Burton, Michigan

BEST AVAILABLE COPY

Office-Supreme Court, U.
FILED
JUL 8 1985
CLERK

No. 84-1909

IN THE

Supreme Court of the United States

October Term, 1984

BRIAN IVAN BROWN,
Petitioner,

v

EARLE I. ERMAN, Chapter 11 Trustee
for Remvest Mutual Investment Trust

and

NEAL SUTHERLAND, Chapter 11 Trustee
for REMVEST FEDERAL ASSOCIATION, INC.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE DECISION OF THE DISTRICT COURT IN DETERMINING THE REASONABLENESS OF AN ATTORNEY'S FEE AWARD DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION?

II

WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT WHEN IT AFFIRMED THE DISTRICT COURT'S DETERMINATION OF WHAT CONSTITUTED A REASONABLE ATTORNEY'S FEE?

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No. 84-1909

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

BRIAN IVAN BROWN,
Petitioner,

v

EARLE I. ERMAN, Chapter 11 Trustee for Remvest Mutual Investment Trust

and

NEAL SUTHERLAND, Chapter 11 Trustee for REMVEST FEDERAL ASSOCIATION, INC.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

Respondents adopt Petitioner's statement of the Opinions Below.

JURISDICTION

Respondents do not contest Jurisdiction.

STATEMENT OF THE CASE

NATURE OF THE CASE AND UNDERLYING PROCEEDINGS

Attorney Brian I. Brown has filed a Petition for Writ of Certiorari alleging that the District Court erred in awarding him only $3,750.00 in attorney's fees for the services which he rendered in an adversary proceeding which was litigated in the Bankruptcy Court for the Eastern District of Michigan. Petitioner represented Robert and Constance Sheppard in that proceeding, and challenged the jurisdiction of the Bankruptcy Court and the terms of two class action settlements which were approved by the Bankruptcy Court, the District Court, and the Court of Appeals for the Sixth Circuit.

On November 23, 1983, the District Court entered an order awarding Petitioner $3,750.00 in attorney's fees. On December 3, 1984, the Sixth Circuit affirmed the District Court's award. On January 22, 1985, the Sixth Circuit denied a Petition for Rehearing.

STATEMENT OF THE UNDERLYING CASE

In June, 1981, an action was filed in the Kent County Circuit Court, by Thomas and Marla Mesler as plaintiffs, to challenge the legality and enforceability of a number of mortgages on residential properties which were written by Emil Coolidge Mortgages, Inc. ("Emil Coolidge") and thereafter sold or assigned to various other entities and persons. That action was actually only one of a number of civil actions which had been commenced in various state courts in Michigan at that time to challenge the validity and enforceability of those mortgages. In addition to those actions, the Attorney General for the State of Michigan initiated an action in 1981 challenging the validity and enforceability of these mortgages. Both the Attorney General and the plaintiffs in the civil actions asserted that the terms of these mortgages violated the federal truth in lending laws, the Michigan usury laws, the Michigan Consumer Protection Act, and were tainted by common law fraud.

In June, 1981, the Attorney General entered into an Assurance of Discontinuance with the defendants named in its action. Among the defendants were Emil Coolidge, Remvest Mutual Investment Trust ("RMIT"), Remvest Federal Association, Inc. ("RFA"), Group Ten Mortgage Company ("Group Ten") and the various principals in each of these companies. RMIT and RFA were the two largest holders of the mortgages written by Emil Coolidge, and Group Ten was the mortgage broker with respect to these mortgages. Under the terms of the Assurance of Discontinuance, the defendants agreed to reform certain of the provisions of these mortgages and agreed to refrain from further conduct and practices in violation of the Michigan usury laws, Michigan Consumer Protection Act and Federal truth in lending laws. In fact, however, only 20 to 25 mortgages were actually reformed under the terms of the Assurance of Discontinuance.

When the terms of the Assurance of Discontinuance were not complied with by the various defendants, the

Attorney General proceeded with its litigation. At the same time, the various civil actions challenging these mortgages were still being prosecuted. As a result, in part, of the litigation involving these mortgages, many of the mortgagors stopped making their monthly mortgage payments. On March 1, 1982, RMIT filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On March 9, 1982, RFA filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Because of the fact that RFA and RMIT were separate entities, having their own separate creditors and assets, a separate trustee was appointed for each debtor and their estates were each separately administered in the Bankruptcy Court. Neal R. Sutherland was appointed as trustee for RFA, a Michigan corporation. Earle I. Erman was appointed as trustee for RMIT, a real estate investment trust.

After the filing of the respective Chapter 11 petitions by RMIT and RFA, the action brought by the Meslers in Kent County Circuit Court, which named both RMIT and RFA among the defendants, was removed to the Bankruptcy Court in Adversary Proceeding No. 81-0518. In view of the fact that the claims of the Meslers involved claims of usury, excessive brokerage fees, truth in lending violations and consumer protection violations which were common to all of the mortgages written by Emil Coolidge, a motion was made before the Honorable George E. Woods for certification of the Adversary Proceeding as a class action under the Federal Rules of Civil Procedure. Notice of the hearing on that motion was provided to all potential members of the class by publication and by first class mail.

On May 25, 1982, Judge Woods signed an Order for Certification of Class Action. That Order directed that the class of plaintiffs be comprised of all those individuals who were mortgagors of mortgages written by Emil Coolidge on or after December 1, 1979. However, that Order also provided that the class be divided into three subclasses pursuant to Federal Rule of Civil Procedure 23. In making the

subclass determination, the Court found that there existed certain questions of fact and law which were unique to plaintiffs whose mortgages were held by certain defendants but not plaintiffs whose mortgages were held by other defendants. Accordingly, the Order for Certification directed that the plaintiff class be comprised of three subclasses, defined by reference to the present holder of the mortgages. If a plaintiff's mortgage was held by RMIT, that plaintiff would be a member of Subclass "A". If the plaintiff's mortgage was held by RFA, that plaintiff would be a member of Subclass "B". Finally, if that plaintiff's mortgage was held by a third person or entity, that plaintiff would be a member of Subclass "C". No objection was made to the division of the class into subclasses nor was any appeal taken from the Order for Certification which divided the class into subclasses.

The Order for Certification of Class Action provided for a period during which mortgagors could elect to opt out of the class action. The Notice of Pending Class Action, which Judge Woods approved as part of the Order for Certification of Class Action, was sent to all mortgagors and informed them of the nature of the lawsuit and their rights to either remain in or opt out of the class. The Notice approved by the Court informed each of the mortgagors that unless they requested exclusion and entered an appearance through counsel of their own choosing, they would be represented by attorneys Willis L. Ash, James Booth Burr and Thomas F. Koernke. By the terms of the Court's Order, the mortgagors had until June 21, 1982 to opt out of the class. Out of more than 450 potential plaintiffs, only about two dozen elected to opt out of the class.

After entry of the Order for Certification of Class Action, the Attorney General intervened in the adversary proceeding and dismissed its other pending litigation in the Ingham County Circuit Court. Thereafter, the Attorney General remained a party in the class action proceedings in Bankruptcy Court.

After entry of the Order for Certification of Class Action, the litigation proceeded separately with respect to each subclass of plaintiffs. Separate settlement negotiations were conducted with respect to each subclass. These separate settlement negotiations mirrored the fact that each subclass had its own unique circumstances, issues of fact and issues of law.

On June 21, 1982, an appearance was entered in the class action proceeding by attorney Brian I. Brown on behalf of Robert and Constance Sheppard. The Sheppards were mortgagors with respect to a mortgage held by RMIT. Accordingly, they were within Subclass "A" of the class action. Prior to the Order for Certification of Class Action, the Sheppards had filed their own adversary proceeding with respect to their mortgage. However, after receiving notice of the Order for Certification, the Sheppards elected to remain in Subclass "A" rather than pursue their own action. Notwithstanding the Sheppards' decision to remain in Subclass "A" and be represented by the Court-appointed class action attorneys, attorney Brown requested that Judge Woods permit him to certify his own class action proceeding with respect to the validity of the Emil Coolidge mortgages. Judge Woods refused to certify a separate action and, in open court, instructed attorney Brown to dismiss his action as the Sheppards were members of and represented in the class action.

Thereafter, attorney Brown filed no pleadings and attended no hearings in the Bankruptcy Court with respect to RMIT and RFA and did not communicate at all either with the Court-appointed attorneys for the plaintiff class or with either the trustee for RMIT or the trustee for RFA. Since attorney Brown had no pending litigation, and since his clients, the Sheppards, did not elect to opt out of the class action, all parties to this action assumed that attorney Brown was no longer involved in any way.

After lengthy negotiations with the Court-appointed attorneys for the plaintiff class, separate settlement agree-

ments were reached by the Subclass "A" plaintiffs with the trustee for the defendant, RMIT, and by the Subclass "B" plaintiffs with the trustee for the defendant, RFA. These settlements, although in some respects similar, contained a number of different terms and provisions which reflected the fact that each of these subclasses had different issues of law and fact giving consideration to the relative strengths and weaknesses of each of these subclasses. On September 7, 1982, a Stipulation of Settlement (hereinafter referred to as the "Subclass 'A' Settlement") was entered into by and between the attorneys for the Subclass "A" plaintiffs and Earle I. Erman, the trustee for RMIT. On September 27, 1982, a Stipulation of Settlement (hereinafter referred to as the "Subclass 'B' Settlement") was entered into by and between the attorneys for the Subclass "B" plaintiffs and Neal R. Sutherland, the trustee for RFA.

After notice of the proposed Subclass "A" Settlement was sent to all Subclass "A" plaintiffs, a hearing on that proposed settlement was held before Judge Woods on September 7, 1982. On October 5, 1982, an Order was entered by Judge Woods approving the Subclass "A" Settlement.

After notice of the proposed Subclass "B" Settlement was sent to all Subclass "B" plaintiffs, a hearing on that proposed settlement was held before Judge Woods on October 1, 1982. Judge Woods signed an order approving the Subclass "B" Settlement on October 1, 1982.

Subsequent to the entry of the orders approving the respective settlements, a notice of appeal from these orders was filed by attorney Brian I. Brown. This notice of appeal represented the first pleading and the first communication of any nature whatsoever that had been received from attorney Brown since the June 21, 1982 hearing when Judge Woods advised him that there was already a certified class action and that attorney Brown could not have his own action certified as a separate class action. Although the notice of appeal was ostensibly filed on behalf of Robert and Con-

stance Sheppard and "others similarly situated," the Sheppards were represented by the Court-appointed attorneys for the plaintiff class since they had earlier elected to remain members of Subclass "A". In addition, although the Sheppards were members only of Subclass "A", the notice of appeal was filed by attorney Brown from both the order approving the Subclass "A" Settlement and from the order approving the Subclass "B" Settlement.

After a number of hearings before the District Court, an Order was entered by the Honorable Avern Cohn on October 29, 1982 which vacated both the October 1, 1982 Order approving the Subclass "B" Settlement and the October 5, 1982 Order approving the Subclass "A" Settlement. Judge Cohn held that there were insufficient factual findings in the record which was made in the Bankruptcy Court to enable him to intelligently review the settlements. Therefore, he entered an Order which remanded the matter to Bankruptcy Court for further proceedings and which enumerated various issues and areas to be considered by Judge Woods upon remand.

Prior to the Order of Judge Cohn, the proceedings with respect to Subclass "A" and Subclass "B" were conducted entirely separately. However, in the interest of judicial economy, an evidentiary hearing was scheduled for November 26, 1982 before the Bankruptcy Court to consider the fairness and reasonableness of both the Subclass "A" Settlement and the Subclass "B" Settlement. A notice of the November 26, 1982 hearing was sent to each member of the plaintiff class. The Notice explained the history of the litigation and contained a comprehensive description of the respective Subclass Settlements. In addition, the Notices were published in the Detroit Free Press, the Flint Journal, the Bay City Times and the Kalamazoo Gazette.

At the hearing held on November 26, 1982, the Court first received evidence and arguments pertaining to the fairness of the Subclass "A" Settlement. Earle I. Erman testi-

fied as to the terms and provisions of that Settlement. Out of a number of Subclass "A" plaintiffs who were present at the hearing, the only one who testified was Mrs. Henry Hill. She testified that the terms of the Subclass "A" Settlement were fully explained to her and that she felt the Settlement was fair and reasonable. One of the Court-appointed attorneys for the plaintiff class, James Booth Burr, Jr., represented to the Court that he had received no objections to the proposed Subclass "A" Settlement but that he had received numerous phone calls from Subclass "A" plaintiffs who enthusiastically approved the Settlement.

After extensive testimony as to the Subclass "A" Settlement, including the type of notice given, the terms of the Settlement, how those terms were arrived at and the reaction to it by the Subclass "A" members, evidence was then introduced with respect to the Subclass "B" Settlement. Neal R. Sutherland, the trustee for RFA, testified as to the terms and provisions of the Subclass "B" Settlement and how they were arrived at. Counsel for the Subclass "B" plaintiffs explained to the Court the different defenses and issues which had been raised with respect to Subclass "B" and how those different defenses and issues resulted in the differences between the Subclass "A" Settlement and the Subclass "B" Settlement. Out of the number of Subclass "B" plaintiffs who appeared at the hearing, testimony was received from Mrs. Betty Kustusz, who testified that she believed the Subclass "B" Settlement to be fair and reasonable.

Luis F. Fernandez, the Assistant Attorney General for the State of Michigan, who negotiated the Assurance of Discontinuance, appeared at the hearing and represented to the Court the Attorney General's belief that the Subclass "A" Settlement was a fair and reasonable settlement for the Subclass "A" mortgagors and that the Subclass "B" Settlement was a fair and reasonable settlement for the Subclass "B" mortgagors. Other mortgagors spoke from the audience at the hearing on November 26, 1982 and also strongly supported both of the Settlements.

Although attorney Brown appeared at the hearing on November 26, 1982, his clients, Robert and Constance Sheppard, were not in attendance. Attorney Brown introduced no evidence of any nature whatsoever to indicate that either the Subclass "A" Settlement or the Subclass "B" Settlement was not fair and reasonable. Nor did he offer any evidence or testimony to show that any member of either subclass had any objections to either proposed Settlement. No mortgagor spoke against either proposed Settlement at the November 26, 1982 hearing, either in person or by affidavit.

At the conclusion of the hearing, Judge Woods issued his Opinion and Order from the bench. Based upon the uncontroverted evidence on the record, Judge Woods found that the Subclass "A" Settlement was a fair and reasonable settlement for the Subclass "A" plaintiffs, and that the Subclass "B" Settlement was a fair and reasonable settlement for the Subclass "B" plaintiffs. Judge Woods adopted, in toto, the Proposed Findings of Fact and Conclusions of Law which had been submitted by counsel for the plaintiff class and endorsed by counsel for the trustees and, in addition, incorporated in his Findings of Fact the testimony of Earle I. Erman, trustee for RMIT, and Neal R. Sutherland, trustee for RFA.

On December 2, 1982, an Order was entered by Judge Woods approving the Subclass "B" Settlement. No appeal from this Order was filed within the required ten day appeal period.

On December 10, 1982, an Order was entered by Judge Woods approving the Subclass "A" Settlement. On December 20, 1982, a Notice of Appeal was filed by attorney Brian I. Brown. Again, although attorney Brown represented no member of Subclass "B", the Notice of Appeal purported to appeal from the December 2, 1982 Order approving the Subclass "B" Settlement, as well as from the December 10, 1982 Order approving the Subclass "A" Settlement.

After filing his Notice of Appeal, attorney Brown did not take any steps to move for Stay of either the Order approving the Subclass "A" Settlement or the Order approving the Subclass "B" Settlement. The trustee for RFA, the trustee for RMIT and counsel for the plaintiff class then began the long process of implementing the Settlements and reforming the mortgages in accordance with those Settlements. Neal R. Sutherland, the Trustee for RFA, has now reformed more than 200 of the mortgages in the RFA portfolio in accordance with the Subclass "B" Settlement. Earle I. Erman has now reformed more than 175 of the mortgages in the RMIT portfolio in accordance with the Subclass "A" Settlement.

The Appeal from the Orders approving the Settlements was heard in the United States District Court by the Honorable Avern Cohn on July 21, 1983. Again, the issue was whether the terms of the settlements were fair, reasonable, and adequate in light of the risk of further litigation and the relative strengths and weaknesses of the plaintiff's case. Judge Cohn, after reviewing the record, including the Bankruptcy Court hearing transcript, the proposed findings of fact and the briefs of the parties, held that there was no basis for finding that Judge Woods' approval of either of the Settlements was clearly erroneous, or constituted an abuse of his discretion. Judge Cohn explicitly found that the hearings conducted by the Bankruptcy Court on November 26, 1982 fully explored all of the advantages or disadvantages of the settlements for each subclass of plaintiffs. Judge Cohn then conducted a *de novo* review of all the facts and circumstances in the record and held that the settlements were fair and reasonable for each subclass. On July 29, 1983, the District Court entered a judgment affirming the orders of the Bankruptcy Court which approved the class action settlements. On August 22, 1983, the Sheppards filed a notice of appeal to the Court of Appeals for the Sixth Circuit.

On December 3, 1984, the Sixth Circuit affirmed the decisions of the District Court and the Bankruptcy Court. The Sixth Circuit concluded that the Bankruptcy Court had

jurisdiction to proceed with the class action. Furthermore, the Court stated that their standard of review for the settlement of class action suits is narrow, and upon consideration of the entire record, concluded that the Bankruptcy Court and the District Court did not abuse their discretion in approving the class action settlements.

COUNTER STATEMENT OF FACTS

Although the Sheppards have now petitioned for a Writ of Certiorari from the decision of the Sixth Circuit affirming the approval of the class action settlements, the subject matter of this Petition for Writ of Certiorari derives from attorney Brown's attempts to charge the Bankruptcy estates of RFA and RMIT for the services he performed on behalf of the Sheppards.

On November 29, 1982, attorney Brown filed a request for attorneys' fees with the Bankruptcy Court. In his petition, he asserted that he had represented Robert and Constance Sheppard for over one year including the hearings on the proposed settlement in the Bankruptcy Court and on the Appeal of the Bankruptcy Court Order to the United States District Court. Attorney Brown contended that he had spent 262.5 hours and stated that, at his office hourly rate of $75.00 hour, he was entitled to $19,762.50 plus costs of $80.00 for a total of $19,842.50. Attorney Brown then concluded that he was entitled to triple the award because of the risk involved in the case, and requested $59,527.50 as a total fee.

On December 13, 1982, Judge Woods held a hearing on attorney Brown's petition. Finding that attorney Brown had never been authorized by the Bankruptcy Court to render any services for the plaintiff class; that such services as were rendered were of no economic benefit to the plaintiff class, the estate of RFA or the estate of RMIT; and, finally, finding that attorney Brown failed to document even those

services which he claimed to have rendered, Judge Woods denied his petition for fees. An Order in compliance with these findings was entered by Judge Woods on February 7, 1983. On February 17, 1983, attorney Brown filed an appeal from the Order of the Bankruptcy Court denying compensation.

The appeal was heard by Judge Cohn in the District Court on November 21, 1983. Judge Cohn issued his Opinion from the bench and incorporated it by reference in an Order which he entered on November 23, 1983. Judge Cohn ruled that the services of Brown may have rendered some non-economic benefit to the estate. Although the respective settlements were each ultimately approved in their original form, and each held to be reasonable and fair, Judge Cohn felt that attorney Brown's services may have created a non-monetary benefit to the plaintiff class by ensuring that all appropriate notices and hearings were conducted to fully explore the fairness and reasonableness of the Settlements. Accordingly, for those services, Judge Cohn awarded attorney Brown a total attorney's fee of $3,750.00, one-half of which was to be charged to the estate of RFA and one-half of which was to be charged to the estate of RMIT. On December 2, 1983, attorney Brown filed Notice of Appeal from that decision to the Court of Appeals for the Sixth Circuit.

On December 3, 1984, the Sixth Circuit Court denied the appeal and affirmed the decisions of Judge Cohn. The Court noted that attorney Brown failed to point to any statutory entitlement for attorney's fees in view of the fact that his clients were given an opportunity to opt out of the class and failed to do so. The Court went on to find that the Bankruptcy Court had appointed attorneys for each subclass within the class, and that these attorneys provided representation to all class members. The Court affirmed the District Court's award of $3,750.00, holding that the District Court did not abuse its discretion.

On December 21, 1984, attorney Brown filed a Motion to File Petition for Rehearing Out of Time. The Sixth Circuit

granted that motion, and on January 22, 1985 denied the Petition for Rehearing, concluding that it did not overlook or misapprehend the facts or issues of law presented by this Appeal.

On April 22, 1985, attorney Brown filed a Petition for Writ of Certiorari, a Motion to proced *in forma pauperis* and a Motion to consolidate the case of *Sheppard v. Erman* with the case of *Brown v. Erman*. On April 25, 1985, this Court rejected attorney Brown's documents based on the determination that there was no Affidavit *in forma pauperis* and for the further reason that they came from different judgments in the Circuit Court of Appeals. On May 27, 1985, attorney Brown refiled his Petition for Writ of Certiorari with regard to *Sheppard v Erman*. On June 7, 1985, attorney Brown refiled his Petition for Writ of Certiorari with regard to *Brown v Erman*, and it is that Petition which is now before this Court.

This response is jointly submitted by Neal R. Sutherland, as Trustee of RFA, and Earle I. Erman, as Trustee of RMIT, in opposition to attorney Brown's Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS NOT SANCTIONED A DECISION WHICH DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND FURTHER, ITS DECISION IS CONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT.

Rule 17 of the Rules of the Supreme Court of the United States set forth the Considerations Governing Review on Certiorari. Rule 17.1 provides in relevant part:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) *When a federal court of appeals* has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or *has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.*
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) *When* a state court or *a federal court of appeals* has decided an important question of federal law which has not been, but should be, settled by this

> Court, or *has decided a federal question in a way in conflict with applicable decisions of this Court*. (Emphasis added).

In his argument, Petitioner Brown states that review on certiorari should be granted because the Court of Appeals for the Sixth Circuit has sanctioned a decision that departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Petitioner further asserts that the Sixth Circuit has decided a federal question in conflict with *Hensley* v *Eckerhart*, 461 US 424; 76 LEd 2d 40; 103 S Ct 1933 (1983). Although Petitioner asserts two separate reasons as grounds for the granting of this Petition, his argument focuses solely on the decision of the United States District Court for the Eastern District of Michigan to award only $3,750.00 in attorney's fees.

Respondents initially contend that a dispute over the reasonableness of an attorney's fee award does not involve the special and important reasons which are necessary to invoke this Court's jurisdiction. Although attorney Brown couches his petition in the language of Rule 17, his entire argument is based on the District Court's decision to award him only $3,750.00 in attorney fees. In essence, petitioner's argument deals with the fact finding of the District Court as to the specific items which were disallowed. Petitioner seeks to have this Court conduct a *de novo* review as to these items. It is abundantly clear that, while this Court has discretion to conduct such review, this case is simply not appropriate for the grant of certiorari in that it lacks the type of special and important reasons which are discussed in Rule 17.

Respondents contend that the decision of the Court of Appeals for the Sixth Circuit affirmed a decision by the District Court which followed the accepted and usual course of judicial proceedings and, further, that its decision is in complete harmony with this Court's decision in *Hensley*,

supra. In *Hensley*, the respondents, on behalf of all persons involuntarily confined in the forensic unit of a Missouri state hospital, brought suit in Federal District Court against petitioner hospital officials challenging the constitutionality of treatment and conditions at the hospital. The District Court, after trial, found constitutional violations in five of the six general areas of treatment. Subsequently, respondents filed a request for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 USC §1988 [42 USCS §1988]. Even though respondents had not succeeded on every claim, the District Court refused to eliminate from the attorney's fees award the hours spent by respondent's attorneys on the unsuccessful claims, finding that the significant extent of the relief clearly justified the award of a reasonable attorney's fee. The Court of Appeals for the Eighth Circuit affirmed on the basis of the District Court's memorandum opinion and order.

This Court granted certiorari to clarify the proper relationship between the results obtained and an award of attorney's fees and, in its discussion, provided the framework which governs the attorney's fee awards in civil rights actions. Although there is no basis for applying the civil rights standard to the bankruptcy context, it is clear that the District Court's opinion in this case, in any event, fully complies with this Court's guidelines. The Court in *Hensley* initially stated that a plaintiff must be a "prevailing party" in order to recover an attorney's fee under §1988. Respondents in this case concur in the opinion of the District Court that attorney Brown's efforts produced a non-economic contribution and conferred a non-economic benefit on the bankruptcy estate.

The remaining question, and the sole issue involved in this petition, involves the District Court's determination of what fee is reasonable. The Hensley Court set forth the following guidelines:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours rea-

> sonably expended on the litigation multiplied by a reasonable hourly rate. . . . Where the documentation of hours is inadequate, the district court may reduce the award accordingly.
>
> The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." . . .
>
> The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." (Footnote omitted).

Hensley, supra, at pp. 433-434.

The *Hensley* court then focused on the extent of plaintiff's success as a crucial factor in determining the proper amount of an award of attorney's fees:

> If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. . . . Again, the most critical factor is the degree of success obtained.

Id. at p. 436. The *Hensley* court also noted that while the district court may also consider other factors identified in *Johnson* v *Georgia Highway Express Inc.*, 488 F2d 714, 717-719 (CA5 1974), many of those factors are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. *Hensley, supra,* at p. 434. This Court has made clear that the district court will not be forced to go through each of the *Johnson* factors before making a determination in every case.

In *Hensley,* this Court concluded that the determination of what constitutes a reasonable fee is largely a matter of the district court's discretion.

> There is no precise rule or formula for making these determinations. The *district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success*. The court necessarily has discretion in making this equitable judgment. (Emphasis added).

Hensley, supra at pp. 436-437. The *Hensley* court went on to hold that where the plaintiff has achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Applying these guidelines to the facts of the instant case, it is clear that the Sixth Circuit, in affirming the decision of the District Court, did not sanction a decision which departed from the accepted and usual course of judicial proceedings, nor does its decision conflict with *Hensley*. The Bankruptcy Court in this case denied attorney Brown's application for attorney's fees. Attorney Brown then appealed to the District Court which conducted its own *de novo* review. The District Court initially made a determination as to the number of hours reasonably expended by reviewing Brown's "time sheet" which covered the period from August 1981 through October 1983. The Honorable Avern Cohn found that:

> The only meaningful contribution which [attorney Brown] made to these proceedings was the filing of objections to the settlement of the class action by the second mortgagor. . . .
>
> These services were rendered between September 7, 1982, and October 29, 1982. I estimate, based upon my review of the file and the rather spartant [sic] nature of the papers filed by Brown, to have involved approximately 50 hours of lawyer's time.

Transcript of hearing, November 21, 1983, Petitioner's Appendix at pp. 36, 39.

Judge Cohn's decision took account of the fact that many of the hours which attorney Brown claimed were compensable on his "time sheet" were not "reasonably expended." For example, on October 8, 1982, Petitioner's time sheets request payment for 5 hours of time for Petitioner himself to perform the ministerial task of driving to the Courthouse (3 hours drive time) to file pleadings which could easily have been filed by mail. On October 21, 1982, Petitioner shows an entry of 16 hours to attend a status conference and review the case file. The status conference took place at 8:45 a.m. and lasted approximately 30 minutes. However, Petitioner's time sheets request payment for the period of time from 6:00 a.m. to 11:00 p.m. Judge Cohn's response to this incredible entry is found in the transcript of the proceedings

> Mr. Shefferly: . . . I was at the same status conference and do not recall it lasting 16 hours.
>
> The Court: Well, he added eight for you [sic, him] and eight for you to balance it out, perhaps.
>
> Mr. Shefferly: Perhaps, your Honor. By way of example, there is another one. . . .
>
> The Court: I understand.

Transcript of Hearing, November 21, 1983, Petitioner's Appendix at p. 32.

Furthermore, this Court has stated that where the documentation of hours is inadequate, the district court may reduce the award accordingly. During the hearing on the Petitioner's Request for Attorney's Fees on December 13, 1983, Judge Woods made a finding of fact that the supporting documentation offered by attorney Brown was totally inadequate. Petitioner failed to meet even the initial burden of proof of proper documentation to support any request for compensation. Although Petitioner did submit revised time sheets to the District Court, those were also grossly inadequate to support the fees requested by Petitioner. Attorney

Brown simply cannot reasonably expect to be compensated for such vaguely described services in the absence of detailed backup material. The District Court took note of the "rather spartant [sic] nature of the papers filed by Brown" in making its determination. *Transcript of Hearing*, November 21, 1983, Petitioner's Appendix at p. 39.

Judge Cohn then used the benchmark hourly rate of $75.00 an hour noting that there was nothing which would indicate that Brown was entitled to any higher hourly rate. It should be noted that while attorney Brown now requests an hourly rate of as much as $115.00 per hour, in his original request to the Bankruptcy Court for attorney's fees, which encompassed all work through November 29, 1982, he only requested an hourly rate of $75.00 per hour.

In short, the District Court performed the exact analysis required by this Court in *Hensley*. The District Court determined the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. The District Court then took into account the important factor of the results obtained and determined that Brown's only meaningful contribution was the filing of objections to the settlement of the class action. It is significant to note that the class action settlements which were ultimately approved on remand to the Bankruptcy Court (and upheld on appeal by the District Court and the Sixth Circuit) were identical to the class action settlements as originally proposed. Once having determined that the plaintiff had achieved only partial or limited success, Judge Cohn, following the accepted and usual course of judicial proceedings set forth in *Hensley*, determined that attorney Brown only provided a non-economic benefit and thus was only entitled to recover $3,750.00 in attorney's fees.

In this case Judge Cohn identified the specific hours that should have been eliminated and took into account the plaintiff's limited success in determining the proper award of attorney's fees. As *Hensley* makes clear, there is no for-

malistic requirement that the district court raise and discuss every factor as set forth in *Johnson, supra.*

Further evidence that attorney Brown is not entitled to recover the full amount which he claims is discerned from his own brief to this Court. Petitioner Brown asserts that in addition to recovery for his efforts in objecting to the settlement (from September 7, 1982 through October 29, 1982), he is entitled to recover from the time he originally consulted with the Sheppards in August 1981. Petitioner's theory is that the "Sheppard class action" has "merged" with the Mesler class action. Petitioner plainly misstates the facts, as there is not now nor has there ever been a "Sheppard class action." Attorney Brown has ignored the fact that Judge Woods specifically refused to certify his proposed class action in June 1982. Furthermore, Judge Woods, in open court, instructed attorney Brown to dismiss his action as the Sheppards were members of and represented in the already pending Mesler class action.

In order to invoke this Court's consideration of this case under Rule 17 of the Supreme Court Rules, Petitioner must demonstrate the existence of special and important reasons for consideration. Petitioner asserts that such reason exists in the Court of Appeals sanctioning a decision of the lower courts which departs from the accepted and usual course of judicial proceedings and in the Court of Appeals deciding a federal question in conflict with *Hensley.* However, a review of the lower court proceedings and the law regarding the awarding of attorney's fees demonstrates that the District Court followed the accepted and usual course of judicial proceedings. Furthermore, a close analysis of *Hensley* reveals that the decision of the Sixth Circuit in this case was in full conformity with that opinion. Therefore, the Petition for Writ of Certiorari must be denied.

RELIEF SOUGHT

WHEREFORE, for the foregoing reasons, a Writ of Certiorari should be denied.

Respectfully submitted,

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